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No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1957

F. R. DAUGETTE, AND F. R. DAUGETTE AND MARY E. DAUGETTE, PETITIONERS

v.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE, DISTRICT OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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OPINIONS BELOW

The opinions of the District Court (R. 193–199) and of the Court of Appeals (Pet. 13–25) are not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1957. The petition for a writ of certiorari was filed January 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the courts below were correct in holding that equitable estoppel was available as a defense on the facts of this case.

STATUTE INVOLVED

Sections 272 (d), 3760 (a) and (b), and 3761 (a) and (b) of the Internal Revenue Code of 1939 are printed in Appendix A, *infra*, pp. 14–15.

STATEMENT

The facts, as found by the District Court (R. 193–199) and stated by the Court of Appeals (Pet. 13–18), may be summarized as follows:

F. R. Daugette (hereinafter called the taxpayer)[1] is engaged in the general construction and building business. In 1947, taxpayer, together with three associates, formed the Larkway Gardens Corporation (hereinafter called Larkway), which was organized to acquire land and have dwellings erected thereon. (Pet. 13–14.)

Taxpayer's alleged consideration for building the dwellings was to be his cost, which was estimated to be approximately $1,400,000, plus a fixed fee of $34,000. (R. 67, 75.) However, an additional part of the transaction involved the receipt by taxpayer, in 1947, of 97,285 shares of class "E" common stock of Larkway. (R. 68.) This stock was carried on Larkway's books at its par value of $97,285, with a corresponding debit to an asset entitled "Builder's Fee, F. R. Daugette." (R. 165–169.) Taxpayer purportedly

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[1] Mary E. Daugette is involved herein solely by reason of having filed a joint tax return with taxpayer for the year 1949.

agreed, at the time of the issuance of this stock, to sell the stock back to Larkway for one dollar upon completion of the project and the receipt by him of his cost, plus the $34,000 fee. The stock was assertedly returned to Larkway upon completion of the project, was cancelled, and was then re-issued, in 1948, to the class "A" common stockholders in proportion to their holdings, taxpayer receiving one-fourth thereof. (Pet. 14-15; R. 69-70, 77-78.)

Taxpayer entered into a similar contract, varying only as to amounts, with a corporation called South Park, Inc. (hereinafter called South Park). On May 18, 1949, a stock certificate for 250 shares of South Park class "B" common stock (which was carried on South Park's balance sheet at its par value of $25,000) was issued to taxpayer, but was never taken out of the stock book. (Pet. 15-16; R. 48-49, 72-73, 167.)

Subsequent to these transactions, an Internal Revenue Agent examined the income tax returns of taxpayer for the years 1947, 1948 and 1949, and proposed deficiencies of $61,805.96 for the year 1947, $14,936.44 for 1948, and $33,291.96 for 1949. The revenue agent also proposed five percent negligence penalties for those years in the amount of $3,090.30, $232.66, and $1,664.60, respectively. (R. 100.) The proposed deficiency for 1947 was based on several items, namely, a $4,014.69 increase in taxpayer's income because of the receipt by him of shares of Larkway class "A" and "D" common stock for services rendered; a $97,285 increase in taxpayer's income because of the receipt of the 97,285 shares of Larkway class "E"

common stock for services rendered; an increase in business income for 1947 of $473.35, representing a gain on the sale of a lot by taxpayer; and an increase by reason of ordinary and liquidating dividends which taxpayer received from a Florida corporation. The proposed deficiencies for 1948 were based in part on the disallowance of a $3,700 bad debt deduction and the adjustment of taxpayer's income on account of the receipt in 1948 of ordinary and liquidating dividends from the Florida corporation. The proposed 1949 deficiency was partially based on a $25,000 increase in taxpayer's income because of the receipt by taxpayer of South Park class "B" common stock for services rendered. (Pet. 16; R. 101–102; Exs. L and M.)[2]

After receipt of the "30-day" letters, taxpayer filed protests and a field conference was held between taxpayer (who appeared with his legal representative and a certified public accountant) and a representative of the Field Conference Section of the Internal Revenue Agent in Charge, at which certain minor adjustments were made in favor of taxpayer. (R. 124–125.) Following the field conference, taxpayer and his representatives had conferences with a technical advisor of the Appellate Division of the Internal Revenue Service to review the deficiencies proposed by the field agent and field conferee. (R. 123, 126.) Taxpayer and his representatives proposed a basis for settle-

[2] Exhibits L and M (R. 104–105) are the so-called "30-day" letters, which inform the taxpayer of a proposed deficiency, and which, in this case, were sent to taxpayer on March 20, 1951, covering the years 1947, and 1948–1949, respectively. They are not part of the printed record but are a part of the record on appeal.

ment which was acceptable to the Commissioner's representative. (R. 126.) The basis of settlement was that the 97,285 shares of Larkway class "E" common stock would be valued at twenty cents per share rather than at their book value of one dollar per share, as proposed by the Commissioner's agents, and would be included in 1947 income (R. 127), and that the 250 shares of South Park class "B" stock would be valued at ten dollars a share rather than at their book value of $100 per share, as proposed by the Commissioner's agents, and would be included in 1949 income (R. 121). Taxpayer agreed to concede the other issues with respect to the years 1947–1949 in favor of the Government, and the Commissioner's representative agreed to eliminate the proposed negligence penalties for each of those years. (R. 127.) After the conference, the Commissioner recomputed the deficiencies, reflecting the terms of the settlement, and forwarded two "Offer[s] of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment" (Forms 870–AD, United States Treasury Department, Internal Revenue Service (Revised July, 1953)), hereinafter called waiver agreements, to taxpayer's attorney. (R. 128.) These were returned, signed by taxpayer and his wife, on May 20, 1954, and were accepted on behalf of the Commissioner on June 18, 1954, by Mr. Brownlee Harvey, Associate Chief of the Appellate Division of the Atlanta Region of the Internal Revenue Service. (Pet. 16–18;

R. 157–158, 195.) The waiver agreements contain the following provisions (Pet. 17; Exs. 2 and 3):

> Pursuant to the provisions of section 272 (d) of the Internal Revenue Code, or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 272 (a) of the Internal Revenue Code, or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies in tax with interest as provided by law.
>
> * * * * *
>
> This offer is subject to acceptance by or on behalf of the Commissioner of Internal Revenue. It shall take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it shall have no force or effect.
>
> If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened nor shall any claim for refund be filed or prosecuted for the year(s) above stated (other than for the amounts of the overassessments shown above), in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations; and the taxpayer also agrees: (1) To make payment of the above deficiency, together with interest, as provided

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Exhibits 2 and 3, the waiver agreements, are not a part of the printed record, but are included in the original record on appeal. Exhibit 3 applies to 1917 and agrees to an income tax deficiency of $[illegible]. Exhibit 2 applies to [illegible] and 1919 and agrees to income tax deficiencies in the amounts of $[illegible] and $[illegible], respectively.

by law, promptly upon receipt of notice and demand from the District Director of Internal Revenue, and not to file an offer in compromise respecting such liability; and (2) upon request of the Commissioner to execute at any time a final closing agreement as to the tax liability, on the foregoing basis, for said year(s) under the provisions of section 3760 of the Internal Revenue Code.

* * * * * *

NOTE. The execution and filing of this offer will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

On September 12, 1955, taxpayer filed a claim for refund for 1947, asserting that the Larkway class "B" common stock was not issued as additional compensation, and that its fair market value was zero. (R. 2, 3 n.) Taxpayer also filed a claim for refunds for 1948 and 1949 on the same date, asserting that the taxpayer never received the 250 shares of South Park class "B" common stock and that such stock had a zero value. (Pet. 18; R. 13, 17-19.) These claims were filed after the period provided by the statute of limitations within which the Commissioner could have assessed the larger deficiencies and negligence penalties originally proposed.[*]

[*] The statutory limitations had been extended by waivers to June 30, 1955. (R. 19.)

On March 16, 1956, taxpayer filed suits in the District Court. (R 1–2, 11–14.) The Director, as an affirmative defense, pleaded estoppel, based upon the Commissioner's reliance, to his detriment, upon the agreements. (R. 9–11, 21–23.) The District Court directed a verdict in favor of the Director on the ground of estoppel. (R. 193–199.) Taxpayer's subsequent motions for a new trial (R. 208–220) were overruled (R. 225, 226), and taxpayer appealed. (Pet. 18; R. 227–228.) The Court of Appeals affirmed (Pet. 13–25).

ARGUMENT

It is axiomatic that where one party to an agreement makes a representation of fact therein and the other party, relying on that representation, acts or omits intended action, an equitable estoppel or waiver exists in favor of the second party. The first party may not thereafter change his position to the other's detriment. *R. H. Stearns Co.* v. *United S[illegible]s*, 291 U. S. 54. This principle has been applied in numerous cases to estop a taxpayer from filing a claim and prosecuting a suit for a refund by reason of the Commissioner's reliance, to his detriment, upon the execution by a taxpayer of waiver agreements similar or identical to those involved in this case. *Guggenheim* v. *United States*, 77 F. Supp. 186 (C. Cls.), certiorari denied, 335 U. S. 908, rehearing denied, 336 U. S. 911; *Schneider* v. *Kelm*, 137 F. Supp. 871, 875–876 (Minn.). *See Girard* v. *Gill*, 142 F. Supp. 770 (M. D. N. C.), affirmed, *per curiam*, 243 F. 2d 166 (C. A. 4th); *Baldwin* v. *Higgins* (S. D. N. Y.), de-

cided June 23, 1937 (37-2 U. S. T. C., par. 9434), affirmed, *per curiam*, 100 F. 2d 405 (C. A. 2d); *Reynolds* v. *Gnichtel*, 1 F. Supp. 606 (D. N. J.); *Rubel Corp.* v. *Rasquin*, 43 F. Supp. 119 (E. D. N. Y.), affirmed, 132 F. 2d 640 (C. A. 2d). Cf. *Lucas* v. *Hunt*, 45 F. 2d 781 (C. A. 5th).

The facts of this case clearly present all the elements required for an estoppel. In summary, the Commissioner preliminarily proposed the assessment of large deficiencies in tax, based upon the adjustment of several items of income, together with the assessment of negligence penalties. Following a series of conferences, the taxpayer filed two waiver agreements, which were accepted by an authorized representative of the Commissioner (see Ex. 9, Commissioner's Reorganization Order 2 (Rev.), Bureau of Internal Revenue, and Ex. 10 (R. 158, 162), Appendix B, *infra*). In these agreements, the taxpayer agreed to the assessment and collection of greatly reduced deficiencies, and the Commissioner agreed not to assess the larger proposed deficiencies and penalties. The parties also agreed not to reopen the case and that no claims for refund would be filed for the years involved. Relying on these agreements, the Commissioner did not assess the proposed larger taxes and penalties. After the statute of limitations with respect to assessments had run (on June 30, 1955), the taxpayer changed his position and filed claims for refund (on September 12, 1955). The Commissioner's omission of intended action was clearly to his detriment and he could not, at the time taxpayer changed his position, place him-

self in the same position that he was in before the agreements. The facts of the instant case are substantially the same as those in *Guggenheim* v. *United States*, *supra*, wherein the Court of Claims held that a clear case for the application of the doctrine of estoppel existed.

Taxpayer contends (Pet. 8) that the decision below conflicts with the decision of this Court in *Botany Worsted Mills* v. *United States*, 278 U. S. 282. However, that case dealt only with the legal effect of the agreement then under consideration. In fact, this Court expressly stated (p. 289) that it did not determine whether an agreement, though not legally binding in itself, may, when executed, become, under some circumstances, binding on the parties by estoppel. This Court did note (p. 289), however, that the findings of the Court of Claims (63 C. Cls. 405) disclosed no adequate grounds for a claim of estoppel. Such findings, in sharp contrast to those here, revealed that the statute of limitations with respect to assessments had not run against the Government at the time the claim for refund there involved was filed.

Taxpayer also contends (Pet. 8) that the decision below is in conflict with *Bennett* v. *United States*, 231 F. 2d 465 (C. A. 7th), and *Joyce* v. *Gentsch*, 141 F. 2d 891 (C. A. 6th). The *Joyce* case merely holds that, on the facts of that case, estoppel was not properly invoked in favor of the Government. The Sixth Circuit based its conclusion, first, on a finding (p. 897) that the record therein disclosed no evidence of misrepresentation of fact upon which the Government relied. The case involved a claim for refund and suit

based upon an entirely new issue which had never been in controversy or discussed by the parties and which was not within their contemplation when the waiver agreement, providing that a claim for refund would not be filed, was entered into. Thus, the facts there are clearly distinguishable from the facts in the instant case. Here, the subject of the claim (the valuation of the Larkway and South Park stock) was considered during all the negotiations and was the crux of the waiver agreements. Under the circumstances of this case, the agreements to pay the deficiencies with respect to the stock and not to file a claim for the years 1947 and 1949 clearly was a representation upon which the Commissioner relied.

In addition, the court in the *Jones* case based its decision on the view (pp. 896, 897) that the Government failed to show that it had been damaged, because, although the statute of limitations had run at the time the claim was filed, the Government could allegedly reopen the tax year in question by applying the doctrine of recoupment. Even if the court was correct in stating that recoupment was available to the Government on the facts of that case and that, therefore, the defense of estoppel was precluded, it is apparent that recoupment was not available to the Government on the facts here. It is clear from the most recent decision of this Court on the doctrine of recoupment (*Rothensies* v. *Electric Battery Co.*, 329 U. S. 296, 299-300) that recoupment is limited to a single transaction. Here, however, the Commissioner, as part of the agreements, in addition to agreeing to

a lower value for the stock, conceded proposed negligence penalties. Clearly, the valuation question and the negligence issue are not based on the same facts and are not a single transaction. Accordingly, the doctrine of recoupment could not be applied to open the closed years as to the negligence issue and the doctrine will not place the Commissioner in the same position in which he was prior to the execution of the agreements and the expiration of the statute of limitations.[5]

Finally, as the Court of Appeals in the instant case noted (Pet. 21), the form used in the *Joyce* case (an unmodified Form 870) had a provision reserving the right to assess a further deficiency, a clause not in the forms signed by the parties in this case. The additional holding of the Sixth Circuit in the *Joyce* case that no equitable estoppel existed because, by the very terms of that agreement, a final definitive settlement was not intended is thus inapplicable here.

With respect to the *Bennett* case, as the Court of Appeals below observed (Pet. 21), the opinion therein contains too little factual statement to permit comparison with the instant case. We submit, however,

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[5] Moreover, it is not clear that recoupment could be availed of even as to the stock valuation question (nor is it clear that *Joyce* v. *Gentsch*, *supra*, was correct in holding it to be applicable on the facts presented in that case) since recoupment with its limited scope would appear to apply only where the single transaction might be the subject of two taxes because of the application of inconsistent legal theories. *Rothensies* v. *Electric Battery Co.*, *supra*, 299-300. Here, and in the *Joyce* case, there was no question of two taxes being levied on inconsistent legal theories. In both cases there was but one tax and the question on the merits is solely factual.

that the *Bennett* case does not expressly hold that estoppel is never available as a defense. The sole question on appeal in that case was (p. 466) whether the waiver agreement constituted a good defense; the lower court having held that the waiver was *legally* binding on the taxpayer, not that the taxpayer was equitably estopped. See *Bennett* v. *United States* (N. D. Ill.), decided June 24, 1955 (56-1 U. S. T. C., par. 11585). The opinion of the appellate court is thus to be construed as merely holding that the agreement was not binding as a matter of law; and such a view is strengthened by the emphasis placed by the Court of Appeals (pp. 467–468) on the question of whether the Commissioner's representative had the authority to close out the matter and *legally* bind the Commissioner.

CONCLUSION

The instant case represents a proper application of the doctrine of equitable estoppel and the decision below is not in conflict with any decision of this Court or of any Court of Appeals. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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Assistant Attorney General.
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SHELDON I. FINK,
Attorneys.

FEBRUARY, 1958.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 3760. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any office, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

(26 U. S. C. 1952 ed., Sec. 3760.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

(26 U. S. C. 1952 ed., Sec. 3761.)

* * * * *

APPENDIX B

Commissioner's Reorganization Order 2 (Rev.), Bureau of Internal Revenue, 18 Fed. Register, Part 4, pp. 3946–3948:

1. There is established in each office of Regional Commissioner of Internal Revenue an Appellate Division, which will maintain such office or offices, situated at such place or places within the Region, as in the judgment of the Regional Commissioner may appear advisable.

2. The personnel of the Appellate Division will include: The Assistant Regional Commissioner, Appellate, who will be Head of the Appellate Division, such Associate Heads of the Appellate Division, such Assistant Heads of the Appellate Division, such Special Assistants to the Head, such Technical Advisors, Auditors, and other employees as may be necessary, each to be designated by the Regional Commissioner.

* * * * *

4. The Associate Heads of the Appellate Division will assist the Head of the Appellate Division as the latter may direct, and during the absence of the Head from duty within the Region, an Associate Head will serve as Acting Head of the Appellate Division and as such will perform the duties of the Head in his own name. During the absence of the Head of the Appellate Division from any office on official business within the Region an Associate Head may perform at such office, in the name of the Head, such of the duties of the Head as the latter may direct.

5. Each office will be under the immediate supervision of an Associate Head or an Assistant Head of the Appellate Division. There

will be assigned to each office such Special Assistants to the Head as may be required to adequately supervise and assist the technical advisors. During the absence of the supervising officer from any office, such office, unless the Head, an Associate Head, or a Special Assistant to the Head is there present for duty, will be under the immediate supervision of a technical advisor designated temporarily by the Head of the Appellate Division as Acting Assistant Head.

* * * * * *

7. (a) Subject to the exceptions set forth in subparagraph (c) of this paragraph, the Regional Commissioner will exclusively represent the Commissioner in determination of Federal income, profits, estate, and gift tax liability (whether before or after the issuance of a statutory notice of deficiency) and in the determination of Federal excise and employment tax liability, as defined in paragraph 15, in all cases originating in the office of any District Director of Internal Revenue situated within the Region, in which the taxpayers have protested the determination of liability made by that officer: Provided, That the Regional Commissioner may delegate to the Head of the Appellate Division or to any Associate Head of the Appellate Division his authority to represent the Commissioner in the determination of tax liability in any case in his jurisdiction, and may delegate to any Assistant Head of the Appellate Division or to any Special Assistant to the Head, with respect to cases assigned to the technical advisors under their supervision, his authority to represent the Commissioner in any such case in which the net deficiency or net overassessment determined by the Director does not exceed $10,000 and the basis of settlement does not involve a net overassessment in excess of $10,000.

(b) Subject to the exceptions set forth in subparagraph (c) of this paragraph, the Regional Commissioner will also have exclusive authority to settle (1) all cases docketed in the Tax Court of the United States and placed on a calendar for hearing at any place within the territory comprising the Region and (2) all cases originating in the office of any Director situated within the Region which are placed on the Washington, D. C., calendar of the Tax Court: Provided, That the Regional Commissioner may delegate to the Head of the Appellate Division or to any Associate Head of the Appellate Division his authority to settle any such docketed case, and may delegate to any Assistant Head of the Appellate Division or to any Special Assistant to the Head, with respect to cases assigned to the technical advisors under their supervision, his authority to settle any such docketed case in which the deficiency (or deficiencies) determined in the statutory notice does not exceed $10,000 and the basis of settlement does not involve a net overassessment in excess of $10,000.

(c) The authority granted in subparagraphs (a) and (b) of this paragraph does not include authority to:

(1) Make or approve a settlement in any case docketed in the Tax Court, except with the concurrence of Appellate Counsel;

(2) Eliminate the ad valorem fraud or negligence penalty in any case not docketed in the Tax Court, except with the concurrence of Appellate Counsel:

(3) Act in any case in which criminal prosecution has been recommended, unless and until final disposition has been made of the criminal aspects thereof; or

(4) Modify any decision of the Excess Profits Tax Council with respect to any issue arising under the provisions of section 722 of

the Internal Revenue Code, except with the concurrence of the Council.

* * * * *

9. Hearings will be accorded by each Appellate Division upon protested cases which have been referred to it by the District Directors situated within the territorial jurisdiction of the Region. The Appellate Division will not, however, consider before the issuance of the statutory notice of deficiency any case in which no protest has been filed with the District Director. In any case in which protest has been filed with the District Director, the Appellate Division will not be required to consider prior to the issuance of the statutory notice new contentions or new evidence that may be decisive with respect to any major issue, but upon the presentation of such contentions or evidence, may refer the issues involved to the District Director for further consideration if advisable.

10. (a) When the Appellate Division has reached a final conclusion with respect to any case, there will be prepared a memorandum thereof setting forth the exact grounds upon which the conclusion rests. Except in cases covered by subparagraph (b) of this paragraph, this memorandum will be transmitted with all the papers in the case to the District Director for appropriate action.

(b) In each case in which the Head of the Appellate Division concludes that a statutory notice should be issued, such notice will be prepared and issued by the Appellate Division after consideration by the Appellate Counsel. The case will be retained by the Appellate Division and, in the event a petition is filed, the case will be transferred to the Appellate Counsel for preparation of the answer or other appropriate pleading. In the event that no

petition is filed, the case will be transferred to the District Director for appropriate action.

11. The Appellate Division will have complete jurisdiction of all cases after the issuance of the statutory notice, except as provided in paragraph 12. Upon the taxpayer's request, the Head of the Appellate Division may take up for settlement any case in which a statutory notice has been issued by a District Director, and may grant the taxpayer a hearing thereon. Except in unusual circumstances, however, he will not grant a hearing in such a case prior to the filing of a petition.

* * * * *

13. At any hearing granted by the Appellate Division, the District Director will be represented if he so desires, or if the Head of the Appellate Division, an Associate Head of the Appellate Division, an Assistant Head of the Appellate Division, or a Special Assistant to the Head, as the case may be, deems it advisable; and at any such hearing on a case involving the ad valorem fraud or negligence penalty, the Appellate Counsel will be represented if he so desires.

14. The intent of the arrangements and procedure prescribed in the foregoing paragraphs is to provide in each Region one unified agency to exercise, for the Regional Commissioner, all the authority which the Department or any of its branches may have under the law in the review of protested tax determinations made by the District Directors and in the settlement of contested cases.

* * * * *

18. The instructions contained in this order supersede prior instructions to the extent that such prior instructions are inconsistent herewith.

19. This order shall be effective July 1, 1953.

[SEAL]

T. COLEMAN ANDREWS,
Commissioner.

Approved: July 1, 1953.

ELBERT P. TUTTLE,
General Counsel for the Treasury Department.

Approved: July 1, 1953.

M. B. FOLSOM,
Acting Secretary of the Treasury.

DEFENDANT'S EXHIBIT 10

U. S. Treasury Department

OFFICE OF THE REGIONAL COMMISSIONER

INTERNAL REVENUE SERVICE

Delegation of Settlement Authority to Associate Head of the Appellate Division

Name: Bromlee Harvey.
Title: Associate Head, Appellate Division.
Address: Birmingham, Alabama.

Date: July 1, 1953.

Pursuant to the authority vested in me as Regional Commissioner by Commissioner's Reorganization Order No. 2 as revised, effective July 1, 1953, and particularly by paragraph 7 of that Order:

Effective immediately and until further notice, or so long as you hold your present office as Associate Head of the Appellate Division of this Region, you are hereby authorized to exercise, in your own name, the authority to represent the Commissioner in any case under the jurisdiction of the Appellate Division of this Region.

E. C. Palmer,
Regional Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1956